Supreme Court, U.S.
FILED
FEB 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 No. 1392

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

PHILADELPHIA FAST FOOD PARTNERSHIP
AND PHILADELPHIA FAST FOODS, INC.,
Petitioners

v.

A. COPELAND ENTERPRISES, MARRIOTT
CORPORATION, AND POPEYES FAMOUS
FRIED CHICKEN AND BISCUITS, INC.,
Respondents—District Court for the Eastern District of Pennsylvania C.A. No. 84-0825

PHILADELPHIA FAST FOOD PARTNERSHIP
(NO. 1) AND PHILADELPHIA FAST FOODS, INC.,
Petitioners

v.

A. COPELAND ENTERPRISES, MARRIOTT
CORPORATION, AND POPEYES FAMOUS
FRIED CHICKEN AND BISCUITS, INC.,
Respondents—District Court for the Eastern District of Pennsylvania C.A. No. 85-0968

UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT
NO. 86-1228

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court, as affirmed by the United States Court of Appeals for the Third Circuit, err in directing a verdict against the petitioners on their causes of action for *per se* violation of Section 1 of the Sherman Antitrust Act by refusal to deal, group boycott, and horizontal market allocation, in refusing to instruct the jury as to those causes of action, in refusing to allow the petitioners to go to the jury with those causes of action, and in refusing to grant a new trial as to those causes of action?

2. Did the charge of the District Court as to the alleged estoppel of the petitioners as against the Marriott Corporation, as approved by the United States Court of Appeals for the Third

Circuit, taint its entire charge and constitute error requiring the granting of a new trial because of its violation of the public policy enunciated by the Supreme Court of the United States against the application of common law affirmative defenses to causes of action arising under the antitrust laws of the United States?

LIST OF ALL PARTIES TO THE PROCEEDING

The caption of this case, as set forth on the cover of the present Petition for Writ of Certiorari, contains the names of all parties to the proceeding. There are no parent companies, subsidiaries or affiliates of the corporation on behalf of which the present Petition for Writ of Certiorari is filed.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS

The Memorandum of Decision of McGlynn, J. in the companion actions in the District Court for the Eastern District of Pennsylvania has not been officially reported. It is unofficially reported in 1 Trade Cas. (CCH) pg. 62, 754 (1986).

The United States Court of Appeals for the Third Circuit did not render an opinion in connection with its Judgment Order of November 3, 1986. That Judgment Order, however, is officially reported at 806 F.2d 253 and 254 (3 Cir. 1986).

STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

This Petition for Writ of Certiorari seeks review of the Judgment Order of the United States Court of Appeals for the Third Circuit dated November 3, 1986, affirming the judgment of the District Court. This Judgment Order of the United States Court of Appeals for the Third Circuit was entered on November 3, 1986.

The Petition of the present petitioners for Panel Rehearing and for Rehearing En Banc was denied by Order of the United States Court of Appeals for the Third Circuit dated November 26, 1986 and entered on November 26, 1986.

Jurisdiction is conferred upon the Supreme Court of the United States to review the Orders of the United States Court of Appeals for the Third Circuit dated November 3, 1986 and November 26,

1986 by the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. Section 1254(1), which provides, in relevant part, that

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;..."

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant statutory provisions are as follows:

Act of July 2, 1890, c. 647, Section 1, 26 Stat. 209, 15 U.S.C.A. Section 1, as amended:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person

> who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years or by both said punishments, in the discretion of the court."

Act of October 15, 1914, c. 323, Section 4, 38 Stat. 731, 15 U.S.C.A. Section 15, as amended:

> "Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the

damages by him sustained, and the cost of suit, including a reasonable attorney's fee...."

STATEMENT OF THE CASE

The District Court had jurisdiction over those Counts of these two actions involving violation of Federal Statutes against restraints on trade and monopolies under 28 U.S.C.A. Section 1337. The District Court had jurisdiction over those Counts of the two actions involving common law causes of action for breach of contract and for interference with existing and prospective contractual relations under the authority of 28 U.S.C.A. Section 1332(a) and by reason of the existence of diversity of citizenship and of an amount in controversy exceeding $10,000.

The two actions both sought relief

for alleged violations of Section 1 of the Sherman Antitrust Act under the "rule of reason" and on a theory of per se violation, for alleged attempt to monopolize and conspiracy to monopolize under Section 2 of the Sherman Antitrust Act, for breach of contract, and for interference with existing and prospective contractual relations. The two actions were consolidated for trial at the opening of the trial and amendment to the pleadings allowed Marriott belatedly to raise a common law defense of estoppel to all causes of action asserted by the plaintiffs, including the Federal statutory causes of action for alleged violation of the antitrust laws. The material facts received in evidence on the trial will now be set forth.

The controversy developed in connection with the efforts of the holder of a single franchise in Philadelphia of the Popeyes Famous Fried Chicken and Biscuits, Inc. franchising system to obtain an additional number of franchises within the Philadelphia marketing area and the exclusion of that holder from any possibility of obtaining such additional franchises by a combination of the defendants Popeyes Famous Fried Chicken and Biscuits, Inc. and Marriott Corporation in actions which amounted to per se violations of Section 1 of the Sherman Antitrust Act. The causes of action for conspiracy to monopolize and attempt to monopolize, for breach of contract, and for interference with existing and prospective contractual relations were fully tried before the District Court,

but the errors of that Court with regard to the trial of those causes of action are not here advanced as reasons for granting of the Petition for Writ of Certiorari.

In September of 1982, Popeyes gave its approval to a plan for the plaintiff partnership to obtain five more franchises in the Philadelphia distribution area, on the basis of a $3,000,000 net worth in the partnership (R. 670, 685, 686, 2197, 2198, 2660). On March 21, 1983, there was an oral agreement between Charles Maxwell and William Copeland which defined the territory within which the additional franchises would be located (R. 713-717, 723). This was an agreement to execute at a later time a formal franchise option agreement. Mutual or bilateral promises were the consideration for this

agreement. The oral agreement of March 21, 1983 was confirmed by a letter from Charles Maxwell dated March 24, 1983 to Terrel Rhoton of Popeyes (R. 719, 2584). Rhoton replied with a letter dated April 1, 1983 confirming the agreement and specifically mentioning five stores (R. 727, 2587). The existence of the contract was confirmed by a letter which Terrel Rhoton of Popeyes wrote on March 24, 1983 to a Mr. Bill Graf in Philadelphia stating that, although Charles Maxwell then had only one store in the Philadelphia area, he had been approved for five additional stores (R. 2613). With his letter of March 24, 1983 to Terrel Rhoton of Popeyes, Charles Maxwell enclosed a check for $5,000 and the letter stated that this amount was to be used to secure territorial franchise rights (R.

719-721, 2584, 2586). The reply letter from Rhoton to Maxwell, dated April 1, 1983, also stated that the $5,000 was a good faith deposit and that it would secure a five store area in Philadelphia (R. 2587).

On July 12, 1983, William Copeland of Popeyes wrote to Charles Maxwell to say that the $5,000 was being returned to him and that he would not be given any more franchises in the Philadelphia geographic market (R. 737, 2588). The breach of the contract to execute at a later time a formal franchise option agreement was effected by this letter of July 12, 1983 which was written by William Copeland after and as a result of the dealings of Popeyes with Marriott detailed below.

In early September of 1983, William Copeland of Popeyes told Charles Maxwell

that Marriott was continuing to demand exclusivity and that the plaintiff would be unable to develop any more franchises in the Philadelphia area (R. 763, 764). By September 20, 1983, Charles Maxwell clearly understood that the petitioners would not be getting any additional franchise rights in the Philadelphia marketing area, and, on September 25, 1983, Maxwell was told that a complete agreement had been reached between Popeyes and Marriott (R. 761, 764, 765, 801, 802, 942, 943). Sometime in December of 1983, Maxwell heard that the formal contract between Popeyes and Marriott had been signed (R. 1004, 2615).

There was direct and circumstantial evidence from which a jury could properly have drawn inferences leading to a conclusion that there had been per

se violations of Section 1 of the Sherman Act. The chronology began with the completion of the bilateral contract of March 24, 1983 to execute a franchise option agreement (R. 719, 2584). Negotiations between Marriott and Popeyes relating to franchises in the Philadelphia geographic market were marked from the beginning by the demand of Marriott for exclusivity in control of Popeyes franchises in the Philadelphia geographic market. Before the $5,000 good faith deposit was returned to Charles Maxwell by William Copeland's letter of July 12, 1983, there had been several conversations between representatives of Marriott and William Copleland, as Executive Vice President of Popeyes (R. 1150). Such a meeting had occurred during the week prior to April 17, 1983 (R. 1151,

2596). At that meeting during the week prior to April 27, 1983, and by subsequent confirming letter of April 17, 1983, Copeland of Popeyes told one Reinemund of Marriott that all of Philadelphia was available to Marriott (R. 1151, 1152, 2596). Subsequently, William Copeland told Charles Maxwell, and implied on various occasions as well, that he had told the representatives of Marriott that Maxwell did have rights already in addition to the one franchise he was already operating (R. 1049-1051). He also told Maxwell that he had told Marriott that Maxwell was specifically planning to open a Popeyes restaurant in Gallery II in the Philadelphia area (R. 1055, 1056). A witness named Cash, representing Marriott, admitted that, while the negotiations were going on, he

did know of the petitioners' one existing store in the Philadelphia geographic market (R. 1308).

Notations were subsequently written onto Marriott's copy of Copeland's letter to Marriott of April 27, 1983. The most important notation was one which was written after the words "all of Philadelphia" and which said "7 store in line" (R. 1709, 1710, 2614). Such is the clear appearance of the Exhibit, even though the Marriott witness who had made the notations contradicted his deposition testimony and professed to think that the number seven looked like a number one (R. 1710, 1713, 1717, 1718, 2240-2243). Seven would be accounted for by the one existing store operated by the petitioners, the five additional stores promised to them by the existing contract with Popeyes, and by at least

one additional store for one or the other of two possible franchisees, who were identified as Freelander or Walker. In May of 1983, a representative of Marriott named Maddocks was told by Freelander about his existing rights in the Wilmington, Delaware area, which was a part of the Philadelphia geographic market. Kline, as a representative of Marriott, said that he met with William Copeland in May and August of 1983 and that the notations on the letter of April 27, 1983 were made at the May meeting (R. 1712-1718, 1729, 2239, 2240). Such notations clearly indicate that Marriott had been told, no later than the end of the month of May, 1983, that there were at least seven franchises in the Philadelphia geographic market which were not then or as yet available to

Marriott, including the franchises which had been promised to the petitioners herein, by a binding contract. Also, Maddocks, of Marriott, admitted that he knew in May of 1983, from Freelander, that Freelander had rights of first refusal to new franchises in the Wilmington, Delaware area, considered a part of the Philadelphia geographic market (R. 1490, 1491).

By June 24, 1983, Maddocks had already had meetings with real estate representatives of Popeyes (R. 1492, 1493). On or about June 27, 1983, because Marriott had just made its first formal proposal to Popeyes, William Copeland of Popeyes memorialized the occasion by writing his own formal memorandum to Alvin Copeland, the President of Popeyes (R. 1155-1158, 2597, 2598). Next came the letter of

July 12, 1983 from William Copeland to Charles Maxwell, returning the $5,000 good faith deposit and giving notice to Maxwell that the petitioners would not be given any more Popeyes franchises in the Philadelphia geographic market (R. 737, 738, 2588). The major terms of the agreement between Popeyes and Marriott had been settled upon before September of 1983 and, in early September of 1983, William Copeland told Charles Maxwell that Marriott was continuing to demand exclusivity and that, for that reason, the petitioners would no longer have any rights to claim or to obtain any franchises in the Philadelphia geographic market in addition to the one franchise already in operation (R. 763-767).

In October or November of 1983, Laytin of Marriott was very annoyed to

hear that Freelander still believed that his rights in the Wilmington area were being protected by Popeyes (R. 1327-1330). Laytin then called William Copeland of Popeyes, said that the Wilmington area had been promised to Marriott and demanded that William Copeland take care of the situation (R. 1330, 1331). William Copeland then prevailed upon Freelander and also upon Mannie Walker, who also had some rights in the Philadelphia geographic market, to give up their rights of first refusal, because Marriott was insisting on exclusivity (R. 1161-1165). The evidence indicated that both Freelander and William Copeland later told Laytin that Freelander had given up his rights in the Wilmington area (R. 1332, 1333). Laytin also wished to go ahead and try to buy the one restaurant still operated

by the petitioners, so that the exclusivity desired by Marriott would be absolute (R. 1340). When Charles Maxwell called Laytin to ask if Marriott would allow him to open any additional Popeyes units in the Philadelphia geographic market, Laytin told him that he did not believe that Marriott would permit any such thing, because Marriott wanted exclusivity in the Philadelphia area (R. 1339, 1340, 1364). Laytin testified that he found that the price set for the petitioners' one Popeyes restaurant was too high for Marriott (R. 1366, 1367). Laytin believed that Marriott could afford to wait until such time as circumstances might force the price for that one franchise down to a level which would be more satisfactory to Marriott (R. 1367).

The contract between Popeyes and Marriott giving Marriott the exclusive right to Popeyes franchises in the Philadelphia geographic market, except for the one restaurant still being operated by the petitioners, was signed in December of 1983 (R. 2615). The evidence from Marriott indicates that its representatives would not have signed the contract with Popeyes if Marriott had not been able to obtain, by that contract, the points upon which it wished to insist, including exclusivity in the Philadelphia geographic market (R. 1493, 1494).

The evidence also indicates that Popeyes had business motivations to accede to the demands of Marriott which were founded primarily upon the attractive prospect of having a single franchisee with financial power and

resources singlehandedly to develop a large number of franchises in the Philadelphia geographic market (R. 1154, 1187-1190). Popeyes therefore agreed and combined with Marriott to exclude from the Philadelphia geographic market not only the petitioners herein but also Freelander and Walker.

The only evidence relevant to the common law defense of estoppel raised by Marriott was to the effect that Charles Maxwell, for the petitioners, had made an inquiry to Laytin of Marriott, before the actual signing of the formal agreement between Popeyes and Marriott, as to whether Marriott would be interested in buying the petitioners' single franchise in the event the petitioners were not permitted to open additional units (R. 788, 2277).

At the close of the petitioners' case, the trial Court directed a verdict against the petitioners on their causes of action for per se violations of Section 1 of the Sherman Antitrust Act. At the close of all of the evidence, the trial Court rejected all Requests for Instructions and suggested Special Interrogatories to the jury proposed by counsel for the petitioners which related to per se violations of Section 1 of the Sherman Antitrust Act, while submitting to the jury, over the objections of counsel for the petitioners, instructions and Special Interrogatories relating to the alleged issue as to whether there was a common law estoppel of the petitioners as to all causes of action asserted against Marriott by reason of the above-mentioned inquiry addressed by Charles

Maxwell to Laytin of Marriott.

The trial Court submitted the issue of alleged violation of Section 1 of the Sherman Antitrust Act to the jury solely on the "rule of reason" theory, with "rule of reason" instructions, including instructions which would have required the jury to make a finding as to whether or not there had been proof of the existence of a relevant market. The first Special Interrogatory submitted to the jury asked, "Do you find by a preponderance of the evidence that a conspiracy or agreement existed between Popeyes and Marriott to restrict competition?" (R. 2575) The answer of the jury was "No" (R. 2576). By reason of its answers to other Special Interrogatories, the jury was not required to reach the Special Interrogatory relating to the issue of

common law estoppel. Verdicts were entered against the petitioners in the consolidated actions and final judgments were subsequently entered in both actions, after the denial by the trial Court of the petitioners' post-trial motions in a Memorandum and Order which were made applicable to both of the consolidated actions. The appeals to the United States Court of Appeals for the Third Circuit were consolidated under one number. The Court of Appeals elected to decide the case on the Briefs and on the Record, without hearing oral argument. The decision of the Court of Appeals affirming the result in the District Court was, moreover, rendered without publication of an Opinion.

ARGUMENT

The first question presented for

review on this Petition for Writ of Certiorari was occasioned by the error of the District Court, affirmed by the Court of Appeals, in directing a verdict against the petitioners on their causes of action for per se violation of Section 1 of the Sherman Antitrust Act by refusal to deal, group boycott, and horizontal market allocation. The District Court, in its Memorandum of Decision, presented three purported grounds for directing the verdict against the petitioners on the issue of per se violations. The first of these was that the jury had answered Special Interrogatory No. 1 by saying that there had been no conspiracy to restrain trade. The District Court considered that any error in directing the verdict had been rendered moot by a jury finding that there had been no conspiracy to

restrain trade. The Court was of the view that a finding of a conspiracy to restrain trade would be prerequisite to a finding of per se violation of Section 1. The error of the Court in this connection is that, while a combination or conspiracy is prerequisite to a finding of per se violations, a finding of combination or conspiracy to restrain trade is not prerequisite to a finding of per se violations.

Special Interrogatory No. 1 inquired, not as to conspiracy or agreement in general, but as to conspiracy to restrict competition. Restriction of competition and/or restraint of trade are not the threshold questions for per se violations; for those violations, the threshold questions are questions as to whether

certain very specific things were done as a result of conspiracy, combination, or agreement. A conspiracy to "restrict competition" is not at all the same thing as a conspiracy to do the specific things which, as a matter of law, and as a result of a presumption, constitute a per se violation of Section 1 of the Sherman Act.

The decisions of the Supreme Court of the United States in the cases of Northern Pacific Railway Company v. United States, 356 U.S. 1, 78 S.Ct. 514, 518 (1958) and United States v. Topco Associates, Inc., 405 U.S. 596, 608, 92 S. Ct. 1126, 1133 (1972) make it clear that it is the intention of the Supreme Court that certain practices are presumed to be illegal and will be deemed by the courts to be unlawful. The determination as to unlawfulness

will be made as a matter of law and by the court, and not by the jury. It will be for the jury to determine whether or not such illegal acts have or have not been committed, but it will not be for the jury to determine whether the acts found to have been committed are or are not illegal or unreasonable. The Requests for Instructions submitted by the petitioners (R. 2673, 2674, 2675) were in accord with these intentions of the Supreme Court. Request for Instruction No. 32 would have instructed the jury that a per se violation is an act which is deemed under the law to be per se unlawful so that, if the jury should find that such acts had been committed, it should not weigh the economic effect of such actions or endeavor to make a determination as to whether or not there had been a

reasonable or unreasonable restraint of trade. The same body of proofs, but with different instructions and different Special Interrogatories to the jury, could cause a jury to bring in a finding of per se violation, even though the same jury, under "rule of reason" instructions and Special Interrogatories, would have found that there was no conspiracy to restrain trade. Since a jury finding that there was a conspiracy to restrain trade or to restrict competition is not prerequisite to a finding of per se violation, and since a jury is not permitted to make its own determination as to whether or not there has been a restraint of trade or a restriction of competition when it has found that specific acts constituting per se violations have been committed, it was error for the District

Court, as affirmed by the Court of Appeals, to conclude that there had been no error in directing a verdict on the issue of per se violations.

It is submitted that the District Court and the Court of Appeals have here decided a federal question in a way which conflicts with applicable decisions of the Supreme Court of the United States.

The District Court, affirmed by the Court of Appeals, has also erred in considering that Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549 (1977) can have an application to the law or to the facts of the present case so as to preclude application of per se theories of violation of Section 1 of the Sherman Act.

In the present case, the conspiracy

and the impact of the conspiracy involve three parties or sets of parties, which are the petitioners, Popeyes, and the Marriott Corporation. Popeyes and Marriott are parties to a vertical conspiracy which has a horizontal impact. The relationship of the petitioners, the injured parties, to one conspirator (Marriott) is horizontal, since the petitioners and Marriott are all either franchisees or potential franchisees, while their relationship to the other conspirator (Popeyes) is vertical. The relationship of the one conspirator (Marriott) to the other conspirator (Popeyes) is vertical, while its relationship as potential franchisee to the petitioners, who are already franchisees, is a horizontal relationship. The conspiracy is vertical, while its impact is

horizontal. Cases in the Third Circuit have established that, in per se cases not involving price-fixing, no more than one of the relationships needs to be horizontal. Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3 Cir. 1979); Malley-Duff & Associates v. Crown Life Insurance Co., 734 F.2d 133 (3 Cir. 1984). Cernuto and Malley-Duff establish that it is the law in the Third Circuit that a per se violation by group boycott, refusal to deal, or market allocation is made out where there is a vertical conspiracy between the manufacturer or franchisor and another party at the same level as the injured party and where the injured party has a horizontal relationship to one conspirator and a vertical relationship to the other conspirator.

The District Court, in its Memorandum of Decision, actually acknowledged that the Court of Appeals in Cernuto determined that per se condemnation of apparently vertical restraints may be appropriate where the purpose and effect of those restraints is to limit horizontal competition.

Quite unaccountably, the District Court concluded that Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549 (1977) forecloses application of the per se rules in the fact situation presented by this case, by Cernuto and by Malley-Duff.

In GTE Sylvania, the Court did not discuss combinations or conspiracies between parties having a vertical relationship in the distributive process; rather, it discussed "vertical restrictions". The vertical

restrictions under consideration were rules of a manufacturer or franchisor prohibiting retailers from selling to other retailers or prohibiting retailers from selling at locations other than the outlets specified in their franchise agreements. The case did not involve vertical conspiracy, as distinguished from vertical restrictions, and it did not involve horizontal impact of vertical conspiracy. The mistake of the District Court, as affirmed by the Court of Appeals, has been to assume that the present case does not involve a horizontal impact or limitation of horizontal competition such as is condemned in Cernuto and Malley-Duff. Continental TV, Inc. v. GTE Sylvania, Inc. involved merely the enforcement of restrictions imposed by a franchisor upon all of its franchisees, and not

what we have in the present case, which is the exclusion and boycotting of a party already having the status of a franchisee by a conspiracy between another franchisee and the franchisor. In misapplying GTE Sylvania to the facts of the present case, the Court of Appeals has decided a federal question in a way which conflicts with the applicable decisions and intentions of the Supreme Court of the United States.

The third reason given by the District Court for directing a verdict against the petitioners on the per se issue was that the evidence did not establish the concerted action necessary to support the claim of group boycott or refusal to deal. The recitation of facts shown by the evidence in the preceding Statement of the Case shows that this final view of the District Court was without merit.

The second question presented for review by this Petition for Writ of Certiorari as to the propriety and effect of the instructions of the District Court relating to application of the common law defense of estoppel to all of the causes of action alleged against Marriott Corporation is controlled by the decision of the Supreme Court of the United States in the case of Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S. Ct. 1981 (1968).

The affirmative defense of estoppel, as pleaded by Marriott, was a general defense applicable to each and every claim made by the petitioners in their Amended Complaint. Proposed Instruction No. 32, prepared and submitted jointly by Popeyes and Marriott (R. 2446), stated, by its own terms, a general

defense made applicable to "any recovery against Marriott Corporation." Estoppel was presented as a general defense and as a general instruction, and the objection made by counsel for the petitioners was an objection which dealt comprehensively with such a general defense and such a general instruction. The District Court chose literally to read to the jury the defendants' proposed Instruction No. 32, with a few interspersed factual references which did nothing whatever to limit the general applicability of the theory of common law estoppel. The general terminology and the consequent general applicability of proposed Instruction No. 32 was continued in the charge actually given by the District Court. The Charge, after making reference to the testimony which supposedly gave

support to the common law defense of estoppel, concluded by saying that if the jury should find that the plaintiff advised a representative of Marriott that the plaintiff did not oppose the proposed agreement between Marriott and Popeyes, then the plaintiff would be estopped from recovery against the Marriott Corporation. This meant that the petitioners were estopped from recovery on any claim against the Marriott Corporation, including the antitrust claims and the conspiracy claims. If the jury applied the estoppel charge to all of the claims against Marriott, including the antitrust claims and the conspiracy claims, then, perforce, Popeyes was also a beneficiary of the charge. If Marriott could not be found liable for conspiracy, then Popeyes could certainly

not be found liable for conspiracy.

The Supreme Court of the United States, in Perma Life Mufflers, Inc. v. International Parts Corp., supra, has emphasized high public policy reasons in support of a rule against invoking common law defenses against private antitrust actions. The Court said:

> "We have often indicated the inappropriateness of invoking broad common law barriers to relief where a private suit serves important public purposes....the purposes of the antitrust laws are best served by ensuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition."

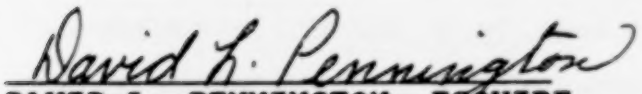
The error of the District Court, as affirmed by the Court of Appeals, in giving the general charge on estoppel was a fundamental and highly prejudicial error and it rises to the order of magnitude which would justify rectification by this Court. It matters not that the jury did not actually reach or answer the particular Special Interrogatory which dealt with the common law defense of estoppel. The fact is that the general charge on estoppel was made applicable to all of the petitioners' claims, that it tainted the entire Charge of the Court, and that, since it came towards the end of the Charge, it must have been fresh in the minds of the jurors when they confronted the first Special Interrogatories relating to conspiracy and relevant market. They had received

no instruction that the doctrine of estoppel was not to be applied to those questions. Quite to the contrary, they had been told that if they found that there was an estoppel, then the plaintiffs could not recover on any of their claims against Marriott. As reasonable men and women, they must have seen also that, if they could not make a finding against Marriott on the conspiracy question, then they could not make a finding against Popeyes on that question.

It is clear that the Court of Appeals for the Third Circuit, with regard to the charge on common law estoppel, has made a decision squarely

in conflict with applicable decisions of the Supreme Court of the United States.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

PHILADELPHIA FAST FOODS, INC., et al.	CIVIL ACTION NO. 84-825

vs.

POPEYES FAMOUS FRIED CHICKEN, INC., et al.

MEMORANDUM OF DECISION

McGLYNN, J. MARCH 13, 1986

Plaintiffs Philadelphia Fast Foods, Inc., and Philadelphia Fast Foods Partnership, collectively known as "PFF", brought this action against defendants Popeyes, Inc. ("Popeyes") and the Marriott Corporation ("Marriott") alleging that Popeyes and Marriott violated the antitrust laws, that Popeyes breached a contract with PFF, and that Marriott tortiously interfered

with PFF's actual and prospective contractual relations with Popeyes. Specifically, PFF claims that Popeyes and Marriott conspired to restrain trade and monopolize the market in "spicy fast food chicken" and that PFF had entered an agreement with Popeyes that gave PFF the right to open five additional franchises in the Philadelphia area, which Popeyes breached by granting Marriott the exclusive right to develop Popeyes' franchises in the Philadelphia area.

At the close of a jury trial lasting three weeks, I directed a verdict for the defendants on PFF's per se claim under Section 1 of the Sherman Act (the "Act"). The jury found for the defendants on all of the remaining claims. In answer to special interrogatories, the jury found that

Popeyes and Marriott did not conspire to restrain trade and that PFF had failed to prove the existence of the alleged product market in "spicy fast food chicken." The jury further found that Popeyes and PFF had not entered into an agreement extending PFF additional franchise rights because they did not intend to be bound contractually until they entered into a formal Popeyes' Option Agreement, and that Marriott did not tortiously interfere with any of PFF's actual or prospective contractual rights.

PFF has now moved for a judgment notwithstanding the verdict or for a new trial contending that this court made numerous errors, 132 to be exact. As the discussion below will reveal, this catalog of errors is characterized by misstatements of the governing

principles, objections not raised at trial, facts not supported by the record, and irrelevant issues which the jury was never required to reach. Accordingly, for the reasons that follow, PFF's motion for a judgment notwithstanding the verdict or for a new trial will be denied.[1]

THE FACTS

Popeyes is a Louisiana corporation which has franchised fast food restaurants specializing in the sale of fried chicken since 1976. At the time of trial, there were eleven Popeyes' franchised restaurants in Philadelphia, ten of which are operated by Marriott and one by Charles Maxwell, Arlie Maxwell, Robert Carrick and Glenna Malcolm, who together formed the Philadelphia Fast Food Partnership.

According to the evidence adduced at trial, there is a four step procedure for obtaining a Popeyes' franchise. First, when an interested applicant contacts Popeyes, Popeyes sends the applicant information and a financial information request form. Second, if the applicant complies and returns the form, the applicant will be asked to forward a refundable $5000.00 good faith deposit and come in for an interview. Both Terrel Rhoton and William A. Copeland, III of Popeyes testified that the purpose of the deposit is to demonstrate that the applicant is seriously interested in acquiring franchise rights.[2]

If Popeyes finds the applicant to be an acceptable operator and financially sound, Popeyes and the applicant may enter into an Option Agreement. The

Option Agreement is a standard Popeyes' form agreement which grants the applicant an option to develop (1) an agreed upon number of Popeyes' stores (2) in a defined area (3) to be opened within a specific time period. The option agreements do not specify individual locations for each store, but rather set out geographic boundaries in terms of city blocks within which all agreed upon stores must be located. If after receipt of the $5,000.00 deposit, Popeyes and the applicant cannot, for any reason whatsoever, agree upon these three terms, or any other terms, Popeyes refunds the $5,000.00 in full.[3] Copeland testified that Popeyes has never granted franchise rights without first executing a Popeyes Option Agreement.

Finally, the applicant exercises each option by entering into an individual Franchise Agreement for each store to be opened under the Option Agreement. Before a store can be opened, the applicant must also obtain Popeyes' approval for a particular site within the territory granted. In defining territories and approving individual locations for a prospective franchisee, Popeyes introduced evidence that it will not permit a franchisee to open a Popeyes store that would compete with another unit in the Popeyes' system, so as to maximize Popeyes' competition with other vendors.[4] The Option Agreement further specifies that "time is of the essence." Thus, if an applicant fails to open stores in accordance with the schedule set forth in the Option Agreement, he forfeits all

rights to his territory, but may continue to operate any Popeyes stores already opened.

In October, 1982, Charles Maxwell and his partners entered into a standard Popeyes Option Agreement for one store. This Option Agreement provided that Maxwell and his three partners would be given until April 8, 1983, to open one Popeyes franchise. Maxwell exercised this option and entered into a Franchise Agreement on December 16, 1982, for a store at 139-143 West Chelten Avenue in Philadelphia.

On March 24, 1983, Maxwell wrote to Popeyes enclosing an unsolicited $5,000.00 check and stating inter alia:

> This $5,000.00 will be used to secure territorial franchise rights to the following area of Philadelphia pending a formal contract:
>
> The eastern portion of territory formally (sic) held by Mr. Kenneth Wall PLUS an

extension of the southern boundary of that territory to Chestnut Street.

The formal definition of the territory will be made after the franchise conference with all territorial rights transferred by April 30th.

* * *

Philadelphia Fast Food Partnership maintains its right to withdraw the $5,000.00 (minus expenses) if a mutually agreeable number of options for this area cannot be determined.

* * *

We have substantial financial commitment. Our sources of capital should be stronger than any franchise in the franchise community.

Popeyes responded by letter dated

dated April 1, 1983, as follows:

This letter acknowledges receipt of your check #1161 in the amount of $5,000.00 payable to Popeyes Famous Fried Chicken. This sum represents a good faith deposit and will secure a yet to be determined five (5) store area in Philadelphia, Pennsylvania.

> In your letter to us dated March 24, 1983 you made reference that you have secured a strong financial commitment. Please forward to us a copy of this financial commitment. If it is strong enough we would be more than happy to let you acquire additional territory.

PFF contends that these letters created a binding agreement between itself and Popeyes to enter into an option agreement for five additional stores in the Philadelphia area. PFF concedes that it never entered into a standard Option Agreement, nor did it send any financial information.[5]

On July 12, 1983, Popeyes sent Maxwell the following letter:

> It has been three months since accepting your $5,000.00 deposit on Philadelphia and nothing has transpired since that time. You have failed to live up to running your store in an organized manner and therefore I have no other alternative but to return your $5,000.00 therefore giving you no further rights to any other portion of the City of Philadelphia.

PFF contends that this constituted a breach of the agreement created by the two letters. Although Charles Maxwell protested to Popeyes both orally and in writing concerning Popeyes' withdrawal from negotiations over additional stores, Maxwell subsequently cashed the refund check.

Thereafter, Maxwell and his partners entered into an agreement purporting to transfer their rights under the Option Agreement of October 7, 1982 to Philadelphia Fast Foods, Inc.[6] Maxwell sought Popeyes' permission to do so as required by the Option Agreement, but there is no evidence that Maxwell sought or obtained permission to transfer rights to the alleged additional territory.

The evidence introduced at trial also reveals that Popeyes first

discussed the possibility of selling franchise rights to Marriott in mid to late April of 1983, but that no agreement was reached with Marriott until December 8, 1983, when a formal Option Agreement was executed. PFF's contention that William Copeland of Popeyes informed Marriott that PFF had existing rights to obtain additional franchises prior to the return of the deposit on July 12, 1983, is not supported by any citation to the record, and indeed, Copeland expressly denied this in his testimony. May 7 Tr. at 27 and 30. In addition, Copeland testified that the use of an exclusive development agreement was a desirable marketing strategy, and Popeyes has regularly used such agreements in other parts of the country.

THE PER SE CLAIM UNDER §1 OF THE SHERMAN ACT

PFF's initial contention is that the grant of exclusive territorial rights by Popeyes to Marriott constitutes a per se violation of §1 of the Sherman Act, which it variously describes as a "horizontal market allocation", a "group boycott" and a "concerted refusal to deal." Specifically, PFF contends that Marriott demanded exclusivity although it knew of PFF's existing rights in Popeyes' franchises, and by acceding to this request, Popeyes entered into a conspiracy with Marriott to exclude PFF from the market. PFF asserts that the court erred in directing a verdict for the defendant with respect to the plaintiff's per se claim under §1 of the Act, and in refusing to charge the jury or submit special interrogatories to them on this issue.

PFF's contention is flawed in several respects. First the jury found that there was no conspiracy to restrain trade, thus precluding the existence of any claim under Section 1 of the Act. Secondly, the relationship between Popeyes and Marriott is a vertical one, and the conduct complained of involves the grant of exclusive territorial rights by a franchisor to a franchisee. Application of the per se rule in this context has been expressly rejected by the Supreme Court. Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977). Finally, PFF has failed to identify any facts that establish the concerted action necessary to support a claim of group boycott. Accordingly, PFF's claim that this court erred in directing a verdict on the per se claim is without merit.

Section 1 of the Sherman Act provides:

> [e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. 15 U.S.C. §1 (1982).

Because almost all business agreements may be interpreted as restraining trade to some degree, §1 has been construed to preclude only those contracts or combinations that "unreasonably" restrain competition. Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958). In determining whether conduct unreasonably restricts competition, the courts employ two rules -- the per se rule and the rule of reason. Generally, a "rule of reason" analysis is employed to determine whether §1 has been violated. Malley-Duff & Assoc. v. Crown Life Ins. Co., 734 F.2d 133 (3d Cir. 1984). Under

this analysis, agreements are evaluated by examining their effects upon competition within relevant geographic and product markets.

An exception to the rule of reason approach has been carved out for those agreements which have a "pernicious effect" on competition and "lack any redeeming virtue" so that they may be presumed unreasonable "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific R. Co. v. United States, supra, 356 U.S. at 5 (1958); Malley Duff & Assoc. v. Crown Life Ins. Co., supra, 734 F.2d at 139. Activities that have been identified as per se violations include price fixing, retail price maintenance, group boycotts, tying arrangements, and certain types of reciprocal dealing. Cernuto, Inc. v.

United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979).

Whether a claim is governed by the per se rule or the rule of reason under §1, the Act requires proof of a "contract, combination or conspiracy" in restraint of trade. It is beyond peradventure that the Act does not reach unilateral conduct, and a manufacturer may sell its products to whomever it wishes. United States v. Colgate & Co., 150 U.S. 300 (1919); Cernuto, Inc. v. United Cabinet Corp., supra, 595 F.2d at 167. The Third Circuit has noted that the statutory language presents a "single concept about common action" and thus simply requires proof of "concerted action". Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 111 (3d Cir. 1980), cert. denied, 451 U.S. 8911 (1981).

Although I directed a verdict for the defendants with respect to the per se claim, the jury was nevertheless asked to consider whether there was a contract, conspiracy to restrain trade, a prerequisite to any claim under §1 of the Act. May 9 Tr. at 122-123. It is only after the finder of fact has made this initial determination that the per se or rule of reason distinction becomes significant. The first special interrogatory submitted to the jury asked:

> Do you find, by a preponderance of the evidence, that a conspiracy or agreement existed between Popeyes and Marriott to restrict competition?

The jury answered "No". Thus, the jury found that Popeyes' grant of exclusive territorial rights to Marriott was an independent business decision by Popeyes

to adopt a desirable marketing strategy rather than the result of any pressure from Marriott to exclude competition. PFF's assignment of error as to the direction of the verdict on the per se claim may be rejected on this basis alone. Nonetheless, PFF's contention must be rejected for the additional reason that the arrangement and conduct that PFF challenges has been held to be inappropriate for per se scrutiny by the Supreme Court.

In Continental T.V., Inc., v. G.T.E. Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court was confronted by a claim that Sylvania had violated §1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from specific locations. The Court upheld the right of Sylvania to

terminate a distributor when that distributor began to sell outside of its allotted territory. In analyzing the effect of the location clause, the Court emphasized that although vertical restrictions of this nature tend to reduce intraband competition, they have the redeeming virture of promoting interbrand competition. Id. at 54-55. The court reasoned that such restrictions are in fact beneficial to competition because they enable manufacturers to compete more effectively against other manufacturers. For example, such restrictions could be used to induce competent and aggressive retailing without fear of free riders, or better enable a manufacturer to enter the market as a new competitor. Id. at 55.

Thus, the Court concluded that, on balance, non-price restrictions in vertical distribution arrangements possess sufficient economic benefits to warrant their testing under a rule of reason standard. Finally, although the Court did not foreclose the possibility that certain types of vertical restrictions might warrant application of the per se rule, it noted that departure from the rule of reason standard must be basd upon "demonstrable economic effect rather than - as in Schwinn - upon formalistic line drawing". Id. at 59.[7]

The conduct PFF challenges under §1 of the Sherman Act was Popeyes' grant of exclusive territorial rights to Marriott. The grant of exclusive territorial rights by a franchisor to a franchisee is a classic vertical

arrangement that tends to promote interbrand competition by encouraging greater capital investment and advertising by the franchisee. Indeed, the majority of courts that have considered the issue have applied a rule of reason analysis to the grant of exclusive franchises. See e.g., JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc., 698 F.2d 1011, 1018 (9th Cir.), cert. denied, 464 U.S. 829 (1983); GTE Sylvania, Inc. v. Continental T.V., Inc., 537 F.2d 980, 997 (9th Cir. 1976) (en banc), aff'd, 422 U.S. 36 (1977); Packard Motor Car Co. v. Webster Motor Co., 243 F.2d 418, 420 (D.C. Cir.), cert. denied, 355 U.S. 900 (1957). As such, the conduct challenged here is clearly within the ambit of Sylvania.

PFF attempts to circumvent this

persuasive line of cases by characterizing the arrangment as a "horizontal market allocation" that is subject to the per se rule. PFF misperceives the nature of horizontal and vertical relationships. Whether a market allocation is horizontal or vertical is determined by the relationship between the alleged conspirators, not by the relationship between the alleged conspirators and the plaintiff as PFF suggests. As defined by the Supreme Court, a horizontal market allocation is an "agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." United States v. Topco Associates, Inc., 405 U.S. 596, 601 (1972). As PFF and Popeyes are clearly not competitors at the same level of the

market structure, there is no horizontal market allocation at issue.

PFF's rambling and, at times, confusing effort to recast what is a simple vertical arrangement of the type contemplated by Sylvania into a group boycott or concerted refusal to deal that is subject to per se treatment under the Act must also be rejected. A group boycott, and thus a per se violation, is made out where there is concerted action "with a purpose either to exclude a person or group from the market, or to accomplish some other anticompetitive objective, or both." Malley-Duff & Assoc. v. Crown Life Insurance Co., 734 F.2d 133, 140 (3d Cir. 1984); citing DeFilipo v. Ford Motor Co., 516 F.2d 1313 (3d Cir.), cert. denied, 423 U.S. 912 (1975). Thus, a plaintiff must prove, either by

direct or circumstantial evidence, that the manufacturer or franchisor and other parties had a "conscious commitment to a common scheme designed to achieve an unlawful objective". Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 111 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981). Independent action is not proscribed. Id. Moreover, the Third Circuit has emphasized that the application of the per se rule in this context should be limited to those situations constituting "classic" group boycotts. Malley-Duff & Assoc. v. Crown Life Insurance Co., supra, 734 F.2d at 142.

PFF asserts that Marriott and Popeyes entered into a conspiracy which had as its purpose the exclusion of other franchisees, including PFF, from the Philadelphia market in Popeyes

franchises. PFF further contends that Marriott instigated this scheme by demanding exclusivity in the Philadelphia area, and PFF was ultimately excluded from all but one location when Popeyes acceded to this demand and terminated its right to open five additional franchises in the area. PFF argues that this conduct constitutes a group boycott. Not only has PFF failed to establish the "concerted action" necessary to sustain a group boycott claim, but its arguments in support of its position reveal a basic misunderstanding of the nature of the group boycott theory.

Initially, the jury's finding that there was no contract or conspiracy between Marriott and Popeyes to restrain trade precludes a finding of concerted action in the group boycott context as well.

Nevertheless, PFF makes several rather convoluted arguments in support of its position that there was enough evidence to send the per se group boycott claim to the jury. Apparently in an attempt to distinguish Sylvania, PFF first argues that a conspiracy to exclude a competitor need only be "partly horizontal and partly vertical", in that it is sufficient if the injured party has a horizontal relationship with just one of the conspirators to make out a per se violation of the Act under the group boycott theory. PFF relies on Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1957) and United States v. General Motors Corp., 384 U.S. 127 (1966) to support its position. PFF misconstrues the rule of these cases.

In Klor's, a retail applicance dealer charged that manufacturers and

distributors of well known brands of appliances had conspired among themselves and with Broadway Hale, another retailer, not to sell appliances to the plaintiff or to sell them to the plaintiff only at discriminatory prices and on highly unfavorable terms. In holding that the conduct of the defendants constituted a group boycott and was unreasonable per se, the Court noted that there was a "wide combination consisting of manufacturers, distributors, and a retailer." 359 U.S. at 212-13. The Court expressly distinguished this situation from that of a manufacturer and dealer agreeing to an exclusive distributorship. Id.

PFF simplistically concludes that because the conspiracy included manufacturers, distributors, and a retailer, Klor's stands for the

proposition that a group boycott may exist if a conspiracy is "partly horizontal and partly vertical". PFF ignores the decisive factors on which the Court relied and its pronouncement distinguishing an exclusive dealership from that of a group boycott. It is difficult to comprehend how PFF can argue that Klor's actually supports its position given the dissimilarities in the factual situations.

PFF's reliance on General Motors is similarly misplaced. In General Motors, the Supreme Court held that joint collaborative action by an association of dealers and G.M. to terminate dealings with other distributors who sold to discounters was a classic conspiracy and was unlawful per se. 384 U.S. at 143-44. Although G.M. seemingly imposed vertical

restraints when it pressured dealers not to deal with discounters, the Court emphasized the horizontal nature of the arrangements, noting that the restraints were in fact induced by dealers seeking to choke off aggressive competition at their level. Id. Furthermore, the court emphasized that the agreement acted as a substantial restraint upon price competition, which also warrants application of the per se rule.

PFF argues that General Motors establishes that a per se violation may be made out in cases involving vertical restraints. Once again, PFF disregards the reasoning underlying the Supreme Court's decision and concentrates on the "formalistic line drawing" cautioned against in Sylvania. Indeed, the Court in General Motors emphasized the horizontal nature of the conspiracy and

the substantial restraint it had upon prices as the key factors in its analysis. These factors are clearly not present in the instant case which involves a simple vertical territorial restriction.

Recognizing that Klor's and General Motors involve multiple conspirators and thus are distinguishable, PFF next argues that a group boycott may be found where a single manufacturer or franchisor conspires with a single dealer or franchisee to effect an unlawful purpose. PFF cites Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979) and Malley-Duff & Assoc. v. Crown Life Insurance Co., 734 F.2d 133 (3d Cir. 1984) in support of this theory. PFF once again misconstrues these cases. It is true that the Third Circuit has declined to

read Sylvania as undermining all per se rules applied to primarily vertical restraint. Cernuto, 595 F.2d at 167, n. 15. Rather, the Court in Cernuto determined that per se condemnation of apparently vertical restraints may be appropriate where the purpose and effect of those restraints is to limit horizontal competition.

In Cernuto, the plaintiff claimed that it had been terminated as a dealer in United's line of kitchen cabinets because a competing dealer complained to the manufacturer that the plaintiff was discounting the cabinets. The court noted that manufacturers are generally free to impose vertical territorial restrictions, but the presence of two factors raised the possibility of a per se violation. First, the action of United was not unilateral but was taken

at "the direction of one of his customers seeking to suppress its competition by utilizing the power of a common supplier." Id. at 168. Thus, the impact of the restraint was primarily horizontal, as the purpose and effect of the termination was to eliminate competition at the retail level and not, as in Sylvania, to promote competition at the manufacturer level.

More importantly, the complaining dealer allegedly was seeking to eliminate price competition. Id. The court emphasized that if the purpose and effect of challenged conduct is to restrain price movement, it is illegal per se. Id. at 169. Accordingly, the Court overturned a summary judgment for the defendants and remanded for trial on grounds that the evidence might make out

a per se violation on the theory that there was a conspiracy to fix prices by eliminating price competition from the market.

The situation at hand is readily distinguishable from that at issue in Cernuto. The record is simply devoid of any evidence whatsoever that the purpose and effect of the vertical restriction was to limit horizontal competition. The jury decided that there was no contract or conspiracy between Marriott and Popeyes to restrain trade, evidently because they found that the grant of exclusive territorial rights to Marriott was an independent business decision by Popeyes rather than the result of pressure by Marriott to exclude all other competitors from the Philadelphia market in Popeyes franchises.

Moreover, there is no allegation in PFF's complaint, and there was no proof at trial, that there was any price motivation underlying Popeyes refusal to grant PFF additional franchises. Indeed, pursuant to Popeyes long established policy for the spacing of its franchise units, Popeyes' restaurants do not compete with one another in price or in any other manner. See, Testimony of Copeland, May 7, Tr. at 22. Rather, Popeyes' decision, as demonstrated at trial, was grounded on its desire to obtain a successful company with a proven track record as a franchisor rather than a small and marginal company with minimal experience. Thus, the purpose and effect of the termination was not to eliminate competition at the retail level, but to promote competition at the

manufacturer/franchisor level. The Cernuto exception to the rule of reason approach does not apply in this situation.

PFF's reliance on Malley-Duff & Assoc. v. Crown Life Insurance Co., 734 F.2d 133 (3d Cir. 1984) is similarly misplaced. In Malley-Duff, the Third Circuit determined that an agreement between insurance sellers, all of whom were competitors of Malley-Duff in the insurance sales business, had conspired among themselves and with Crown Life to freeze Malley-Duff out of the Crown Life Insurance market. 734 F.2d at 141. Relying on the language in Cernuto that a vertical restraint might constitute a per se violation if its purpose and effect is to limit horizontal competition, the court concluded that the vertical nature of the restraint did

not defeat Malley-Duff's right to go to the jury on the theory of a per se group boycott because its impact was primarily horizontal in nature. In addition, the court concluded that the evidence revealed a "classic group boycott: concerted action by competitors to excluded Malley-Duff from the market. Id. at 142. The fact that the life insurance company was involved in the conspiracy was not a decisive factor.

In sum, PFF has not demonstrated that this court erred in directing a verdict for the defendants on the per se claim for a number of reasons. As the discussion above reveals, there simply was no evidence to allow the claim to go to the jury. The record is "critically deficient of that minimum quantum of evidence from which a jury might reasonably afford relief." Dawson v.

Chrysler Corp., 630 F.2d 950, 959 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981); citing, Denney v. Siegel, 407 F.2d 433, 439 (3d Cir. 1969). Accordingly, PFF's motion for a judgment notwithstanding the verdict or for a new trial on this ground is denied.

THE CLAIM UNDER SECTION 2 OF THE SHERMAN ACT

PFF's principal contention with regard to its claim under §2 of the Sherman Act is that the court failed to properly instruct the jury on the relevant product market. Specifically, PFF contends that the jury should have been instructed that there were relevant product markets in "Popeyes' franchises" and in "Popeyes' spicy fast food chicken" in addition to the instruction given on the market in "spicy fast food

chicken." There was no error in failing to instruct the jury on these purported markets because PFF introduced no evidence upon which a jury could have found relevant product markets in these commodities. Moreover, since PFF failed to properly object at trial to this aspect of the instructions on the relevant product market, PFF has not properly preserved its right to challenge this issue on a post-trial motion.

Section 2 of the Sherman Act prohibits all monopolies and every attempt or conspiracy to monopolize commerce. An essential prerequisite to a claim of monopoly under §2 is "the possession of monopoly power in the relevant market". United States v. Grinnell Corp., 384 U.S. 563, 570 (1966). This typically involves a

delineation of the product and geographic lines within which the specific commodity is sold.

Definition of the relevant product market involves identification of all the substitutes available to buyers of the seller's product. In identifying these products, the Supreme court has emphasized that courts must determine what products have "reasonable interchangeability for the purposes for which they are produced -- price, use, and qualities considered." United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 404 (1956). Thus, factors such as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity

to price changes, and specialized vendors" should be considered in determining interchangeability. Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1952).

As an initial matter, PFF's failure to object at trial to the absence of an instruction on "Popeyes franchises" precludes PFF from raising such an objection at this time. Rule 51 of the Federal Rules of Civil Procedure requires a party objecting to an instruction or the failure to give an instruction to do so at trial and to state the specific grounds for the objection.

At the charging conference, PFF objected to the use of the word "interchangeable" in the defendants' proposed jury instructions, but did not object on the basis that it omitted an

alternative theory of a market in "Popeyes franchises". Tr. May 8 at 86-87. At trial, I instructed the jury as follows:

> Philadelphia Fast Foods has taken the position that a fast food spicy chicken served with other spicy dishes alone represents the relevant product market. Popeyes and Marriott have argued that the relevant market is larger than fast food spicy chicken, it includes all fast food chicken and all types of other fast foods, including hamburgers and pizza.
>
> If and only if you find by a preponderance of the evidence that fast food spicy chicken as described is not considered reasonably interchangeable with other fast food products, you may find that fast food spicy chicken constitutes a separate product market. May 9 Tr. at 130.

Following the charge, PFF objected to the instruction because it was "in the nature of an improper binding instruction." May 9 Tr. at 171. Thus,

PFF did not in any manner inform the court that its objection was based on the omission of a product market in "Popeyes' franchises".

PFF's objection to special interrogatories 2 and 8 is similarly flawed.[8] PFF only registered a general objection disputing inclusion of the word "only" in the interrogatories and did not make any reference to a market in Popeyes franchises. As such, PFF should not be heard to complain about the absence of such an instruction at this point in the proceedings

Nevertheless, even though PFF did not properly preserve its right to raise the issue in its post trial motion, I find it unnecessary to rest my decision on this ground, as the record is devoid of any factual support for PFF's contention that the jury should have

been instructed on a market in Popeyes' franchises.

PFF relies solely on the testimony of Dr. Shephard, its expert witness, as evidence that there is a relevant product market in Popeyes' franchises. Dr. Shepard's testimony on this aspect of the case reads as follows:

> Q. Did you identify any other relevant market to the issues in this case, related or unrelated to spicey (sic) fast food chicken?
>
> A. Yes. I think it helps to picture also competition for the franchises issued by Popeyes in the Philadelphia area.
>
> This was in this case the competition between Marriott and the plaintiff, Maxwell, and I suppose between one or two others who were in this market and held franchises. In that sense, another level, perhaps you might call it a level above the actual selling point of the chicken, you have the competition for the franchises so that you then can sell chicken. (Testimony of William Shepherd, May 1, 1985, Tr. at 12.)

Dr. Shepard clarified this testimony on cross-examination:

> Q. With respect to the product market, as I understand your testimony, the product market is spicey (sic) fast food fried chicken, is that right?
>
> A. Spicey (sic) fast food chicken. (Testimony of William Shepherd, May 1, 1985, Tr. at 40.)

PFF produced no other evidence supporting a product market in Popeyes' franchises beyond this ambiguous testimony. Furthermore, Dr. Shepherd's testimony on this issue is without an analysis or economic support and is replete with contradictions.[9] Dr. Shepherd admits that he did not conduct any independent studies on consumer preference or price, quality and end use similarities, but formulated his opinion by reading what "was available in the record, and compared it with the broad

flow of research and other materials that I have defined in the past." Id. at 50-51.

Finally, PFF specifically contradicted its claim that there was a relevant market in Popeyes' franchises at several points in the proceedings. For example, PFF referred to the relevant market as the "fast food spicy chicken market" in its pre-trial memorandum. In addition, PFF's counsel affirmatively represented that the relevant market was "spicy fast food chicken" in response to a question by the court during the charging conference. May 8 Tr. at 57-58. As such, the court was justified in any charging the jury on the "spicy fast food chicken market."

In direct contrast to Dr. Sheperd's testimony, the testimony of Gary French,

an expert witness for Popeyes, on the relevant product market is well documented. Mr. French testified that the relevant product market was "fast foods at either the retailer or franchisor level." Testimony of Gary French, May 6 Tr. at 82. Mr. French based his conclusions on an extensive independent study conducted by himself and his staff. Id. at 88-102. Specifically, Mr. French testified that Popeyes faces competition from all fast food outlets and that there are low barriers to entry and a high degree of cross elasticity of demand in the fast food market. He also stated that there was no product market in Popeyes' franchises, and if the market were to be defined in terms of franchises, it would have to include all fast food franchises. Id. at 123-124.

Thus, there was no substantive support for the position that there was a relevant product market in Popeyes' franchises. This conclusion is further buttressed by the fact that the jury specifically found in answer to special interrogatory 8 that the relevant market did not consist "only of spicy fast food chicken." This finding implies that the jury agreed with Popeyes that the market consisted of other fast foods as well.[10] Accordingly, PFF's challenge to the instruction on the product market is without merit.

PFF also challenges the instruction on the relevant geographic market. I instructed the jury as follows:

> The relevant geographic market is that area in which Popeyes encounters competition from other products in the relevant produce market. Thus, if you find the relevant product market is fast food spicy chicken, the relevant geographic market is the

territory in which Popeyes competes with others for the sale to its customers of fast food spicy chicken. May 9 Tr. at 131.

PFF contends that the language "the territory in which Popeyes competes with others for the sale to its customers of spicy fast food chicken" infers that the geographic market is nationwide because Popeyes is a nationwide chain. In addition, PFF argues that this definition of the market does not comport with the test prescribed by the Third Circuit in Pa. Dental Assoc. v. Medical Service Ass'n of Pa., 745 F.2d 248, 260, (3d Cir. 1984), cert. denied, 105 S. Ct. 2021 (1985), which defines the relevant geographic market as the area in which "a potential buyer may rationally look for the goods or services he or she seeks...." I fail to see how there is any material difference

between this test and the proferred instruction. In any event, PFF's objection to the instruction is irrelevant given the jury's finding that PFF had failed to establish a relevant product market.

The remaining antitrust jury instructions that PFF challenges related to monopoly, monopoly power, attempted monopolization and conspiracy to monopolize. Because the jury determined that PFF failed to establish a relevant product market, PFF cannot, as a matter of law, show monopolization, attempted monopolization or conspiracy to monopolize. See, United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 404 (1956); Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 117 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981) (attempt to monopolize requires

market definition); Bravman v. Bassett Furniture Industries, Inc., 552 F.2d 90, 103 (3d Cir. 1977), cert. denied, 434 U.S. 909 (1972) (specific intent to monopolize must relate to a specific market). Thus, even assuming arguendo that these instructions were incorrect, any error would necessarily be irrelevant and harmless.[11]

Moreover, many of the instructions to which PFF now objects are identical to the proposed jury instructions that PFF submitted to the court. As such, PFF cannot now complain that the court adopted some of their own proposals. Indeed, the fact that PFF even raises these objections serves only to highlight the paucity of legitimate issues raised by its post-trial motions.

PFF first claims that the court erred by defining monopoly as "the power

to control prices or exclude competition wherever they desire to do so." May 9 Tr. at 135. PFF contends that they jury should have also been instructed that monopoly power could be found when there was an ability to restrict competition as well as exclude it. Yet, PFF used precisely the same language in its proposed jury instruction No. 44, which asked the Court to instruct the jury that they "must find they had the power to control prices or exclude competition whenever they desired to do so." Moreover, the challenged instruction comports with the definition of monopoly power enunciated by the Supreme Court on more than one occasion as "the power to control price or exclude competition." See, e.g., United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); United States v. Grinnell Corp.,

384 U.S. 563, 571 (1966). Any assignment of error in this regard is, therefore, not only unwarranted, but clearly frivolous in light of established precedent and PFF's own proposed instructions.

Similarly, PFF's proposed jury instruction as to when monopoly power may be inferred because of a party's market control is identical to the one I submitted to the jury. Both state that monopoly power may be inferred when the alleged monopolist controls more than two-thirds or 70% of the market. PFF now argues that the charge was "incorrect, misleading, and prejudicial insofar as it suggested to the jury that where the percentage of market control was less than two-thirds monopoly power cannot be inferred." PFF's Brief at 48. PFF contends that it is unnecessary

to cite any cases to this effect because the cases in which monopoly power was inferred even though the percentage of market control was less that 50% are "too numerous for citation." Not only is PFF estopped from challenging the instruction because of its identically worded proposed instruction, but its pronouncement that market power may be inferred when market share is less that 50% is incorrect. Although it is true that there is no absolute floor on what percentage of market share or control must be shown to establish monopoly power, the Supreme Court has emphasized that it must be a "predominant share", and the majority of cases dealing with this issue have required a showing of at least 70%. See, United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); American Tobacco Co. v.

United States, 328 U.S. 781, 797 (1946); United States v. Grinell Corp., 384 U.S. 563, 571 (1966).

PFF's objection to the instruction on attempted monopolization is likewise unfounded. Not only is the instruction identical to that proposed by PFF, but it accurately states the law. PFF claims that the instruction was incorrect because the jury was told that they must find that there was a dangerous probability that Marriott would acquire 90% of the market in order to find an attempt to monopolize. This is simply an inaccurate reading of the instruction, which stated:

> Certainly 90 percent of the supply is enough to constitute a monopoly.
>
> In order to show an attempt to monopolize, there must be at least a dangerous probability that the defendant Marriott could acquire such a market share. If you find no such dangerous probability exists,

> then you must find for the defendant Marriott on the plaintiffs' attempt to monopolize claim. May 9 Tr. at 136.

The reference to 90% of the market was merely an example and must be read in its proper context. Thus, the instruction was not misleading.[12]

THE BREACH OF CONTRACT CLAIM

PFF objects to several of the courts instructions regarding PFF's breach of contract claim. Specifically, PFf challenges this courts instructions as to 1) whether the contract was sufficiently definite to constitute a meeting of the minds; 2) whether the alleged contract was conditional, and if so, whether those conditions were satisfied; and 3) whether the contract was supported by consideration. PFF does not suggest that these instructions incorrectly stated the law, but rather

posits that there were two separate contracts at issue, and the court's failure to distinguish between the two in the instructions was inherently confusing and prejudicial. PFF's principal contention in this regard is that the court

> incorrectly states that the plaintiff contends that it entered into a franchise option contract with Popeyes. At no time did plaintiff make such a contention. Its position was always that it entered only into a contract to enter at a later time into such a franchise option contract. PFF's Brief at 57.

PFF asserts that Popeyes breached this first contract, the contract to enter into an option agreement at a future time, before it had ever entered into the formal option contract, and that the court's failure to make this clear in its instructions was error. PFF asserts that this error entitles

them to a new trial.

PFF's peripatetic argument in support of its position that there were two contracts is a somewhat feeble attempt to overcome the fact that it never executed a formal Option Agreement with Popeyes, and ignores the fact that the jury specifically found in response t special interrogatory No. 12 that PFf and Popeyes had not agreed to be bound prior to the exeuction of such an agreement.[13] As noted above, the evidence clearly established that there was a four step procedure for obtaining a Popeyes' franchise, culminating in the execution of a standard Popeyes' option form. It is undisputed that Popeyes and PFF never executed the formal Option Agreement. To overcome this rather formidable obstacle, PFF now argues that there was an agreement to enter into an

option agreement at a future date, and it was this initial agreement that was breached.

In light of the jury's finding, it is immaterial whether the alleged agreement is characterized as an "option contract" or as an "agreement to enter into an option contract." It is hornbook law that a contract is not enforceable unless the parties intended to conclude a binding agreement, and the essential terms of that agreement are certain enough to provide the basis for an appropriate remedy. See, e.g., Zukoski v. Baltimore O. R. Co., 315 F.2d 622, 625 (3d Cir.), cert. denied, 375 U.S. 856 (1963); Linnett v. Hitchcock, 324 Pa. Sup. 209, 211, 471 A.2d 537, 540 (Pa. 1984); Sweeney v. Popeyes Famous Fried Chicken, Inc., 427 So. 2d 464 (La. App. 1983). The jury found that the

parties did not intend to conclude a binding agreement. PFF cannot circumvent this conclusion by recharacterizing the agreement at issue.

Furthermore, the special interrogatory asked the jury to consider whether there was any binding agreement relating to the grant of additional franchise rights to PFF. As such, plaintiff's contention that the jury was not given the opportunity to consider whether or not there was a binding agreement concerning the five additional franchises prior to the execution of the formal option contract is without merit.

Because the jury found that the parties did not intend to be bound prior to the execution of a formal option contract, they never reached the interrogatories which PFF now challenges concerning the essential elements of the

contract, whether the contract was conditional, and whether there was consideration for the contract. Accordingly, any assignment of error as to these issues is necessarily irrelevant. PFF argues, however, that the courts instructions on these issues influenced the jury's decision that no agreement had been reached, and any error in these instructions therefore tainted the entire decision making process. Specifically, PFF contends that the initial contract would not have been subject to the same elements of proof as the formal option contract, and the courts failure to distinguish between the two contracts may have led the jury to hold them to the same standard. PFF's Brief at 22. As discussed below, these instructions were not only proper, but it would have been

error not to so instruct the jury given the evidence introduced at trial.

The first breach of contract instruction to which PFF takes exception asked the jury to determine if there was a meeting of the minds on all the essential elements of the contract and the contract was therefore definite enough to be enforceable. The instruction also asked the jury to determine what the essential elements of the contract were. The challenged portion of the instruction reads as follows:

> The contract must be complete. There must be a meeting of the minds on all the essential elements.
>
> The plaintiff contends it entered into a contract with Popeyes to open a certain number of Popeyes' franchises within a certain territory in the Philadelphia area. You must determine what the essential elements of such a contract are. Can you have an option or an agreement without

> a territorial franchise without the territory being defined; can you have a contract for the number of franchises to be open without identifying the number of franchises to be open within the territory; can you have an option contract without a fixed timetable within which these franchises would be open?
>
> If you find they are essential elements, there must be a meeting of the mind with repect to those elements, and if you find that Popeyes and Mr. Maxwell acting on behalf of Philadelphia Fast Foods really did not come to an agreement with respect to any essential elements of this contract, then there can't be a contract because one side could not enforce it. If there's no agreement, one side could not enforce that contract. May 9 Tr. at 139-40.

PFF contends that this instruction confused the jury because it failed to distinguish between the two contracts, and while these factors may have been essential elements of the option

contract, they may not have been essential to the first contract. PFF also claims that it was unnecessary to ask the jury whether agreement was reached with respect to the definition of the territory, the designation of the opening schedule, and the number of units to be opened because adequate specificity as to these factors was conclusively demonstrated at trial.

PFF's contentions are flawed in several respects. It is firmly established that a contract is not enforceable unless there is a meeting of the minds on the essential elements of the agreement, and the essential terms of that agreement are certain enough to provide the basis for an appropriate remedy. See, Rusiski v. Pribonic, 326 Pa. Super. 545, 474 A.2d 624 (1984).

Linnet v. Hitchcock, supra, 324 Pa. Super. at 211, 471 A.2d at 540. However, the alleged contract is labeled, it was necessary to instruct the jury as to the essential elements of a franchise agreement and the requirement of specificity in a contract because Popeyes contended that it would not have entered into any agreement relating to the extension of additional franchise rights unless it had reached an agreement with PFF on these issues. PFF itself concedes that "a contract to execute a later contract must contemplate the specific terms of the later agreement." PFF's Brief at 55. Furthermore, it defies logic that Popeyes would enter into an agreement to execute a later contract whose terms were vague and indefinite when the effect of entering into that agreement

would be the same as if it had actually entered into a formal Option Agreement with PFF.

Finally, there is ample evidence in the record that supports Popeyes' contention that these were essential elements of the agreement, and there was no meeting of the minds on these issues. For example, PFF asserts that the parties had agreed upon a specified territory citing Maxwell's letter of March 24, 1983, which stated that the territory would the "the eastern portion of territory formally (sic) held by Mr.Kenneth Wall plus an extension of the southern boundary of that territory to Chestnut Street." Yet, Terrel Rhoton's letter to Maxwell states that Maxwell's $5,000.00 deposit represents a "good faith deposit and will secure a yet to be determined five (5) store area in

Philadelphia, Pennsylvania." This hardly indicates that the parties had come to a meeting of the minds on a specific territory.

Similarly, PFF's contentions that the opening schedule need not be established with specificity but that a reasonable time should be implied because of the absence of any indication to the contrary conflicts with the requirement in the formal Option Agreements used by Popeyes that "time is of the essence."[14] Since there was substantial evidence that Popeyes and PFF had not agreed upon the boundaries of the franchise territory or the schedule on which the franchises were to be opened, it was necessary for the jury to determine whether a full meeting of the minds had been reached on any alleged agreement relating to the grant of franchise rights.

The second and primary instruction to which PFF takes exception required the jury to determine whether the alleged contract was a conditional one, that is, whether Popeyes required PFF to submit satisfactory financial statements and prove its ability to operate Popeyes franchises in a capable manner. Contrary to PFF's assertion that the specification of these two factors as possible conditions was "tantamount to a finding by the Court as a matter of law as to the existence of conditions and as to the identity of those conditions", the challenged instruction merely asked the jury to determine if the contract was a conditional one. See, PFF's Brief at 59. It then identified what those conditions would be based on the evidence introduced at trial.

The letter dated April 1, 1983, from Terrel Rhoton of Popeyes to Maxwell expressly conditioned the grant of the five additional franchises on the production of satisfactory financial statements. In addition, William A. Copeland of Popeyes testified that Popeyes also conditioned the grant of franchise rights on Maxwell's ability to operate the stores satisfactorily. See, Testimony of Copeland, May 7 Tr. at 11. This evidence shows that the conditions imposed by Popeyes applied to the grant of any franchise rights to PFF, regardless of whether that grant is characterized as a franchise option agreement, or a contract to enter into a franchise option agreement.[16] Accordingly, PFF's contrived argument that this court's failure to distinguish between the two contracts was

prejudicial because the jury should have been asked to decide if these were conditions of both contracts or only of the first or second contracts must be rejected.

PFF also challenges the courts instruction on consideration. The jury was told that if PFF "could have refused to enter into a formal option agreement and obtain a full refund of the $5,000.00 deposit, then you must find the plaintiff did not give anything of value and must find in favor of the defendants on the contract claim". May 9 Tr. at 142. PFF now asserts that the instruction was incorrect because the consideration it tendered was a promise to enter into a Popeyes Option Agreement, and not the $5,000.00 deposit.

It was not error to instruct the jury to consider whether the $5,000.00 paid by Maxwell to Popeyes was the consideration for the alleged contract because this was the theory on which Popeyes prosecuted the lawsuit.[17] It was not until the filing of this motion for a new trial that PFF asserted that the consideration was merely a promise to entere into a Popeyes Option Agreement. Accordingly, PFF's contention must be rejected.

THE INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS CLAIM

PFF also objects to the instructions regarding its claim of intentional interference with contractual relations. Specifically, PFF contends that the court erred by instructing the jury that it must find "that Marriott's purpose was to injure or harm the

plaintiff" in order to find against Marriott on the interference with the prospective contractual relations claim.[18] Not only is PFF barred from raising this objection to the instruction because it failed to raise the issue at trial, but the instruction is in accord with applicable Pennsylvania law. In Glen v. Point Park College, 441 Pa. 474, 477, 272 A.2d 895, 899 (1971), the Supreme Court of Pennsylvania held that the tort of interference with prospective contractual relations requires a showing that the defendant acted as he had "for the purpose of causing harm to the plaintiff." The instruction was therefore correct.

THE ACCORD AND SATISFACTION CLAIM

PFF does not challenge the legal sufficiency of the instruction and

special interrogatory on accord and satisfaction. Rather, PFF's principal contention is that the court failed to instruct the jury that if Popeyes had an already existing obligation to return the $5,000.00 deposit, then it could not have been the consideration for an accord and satisfaction.[19] As the jury never reached the issue of accord and satisfaction, PFF's objection is irrelevant. Nevertheless, even if the instructions were pertinent, there was no error because PFF misconstrues the law in its assertion that the refund of the deposit was an already existing obligation and, therefore, could not be consideration for an accord and satisfaction. When there is a genuine dispute between the parties, and one side cashes a check tendered to end a dispute, an accord and satisfaction is

reached. Goodway Marketing, Inc. v. Faulkner Advertising Assoc., Inc., 545 F. Supp. 263 (E.D. Pa. 1982); Law v. Mackie, 373 Pa. 212, 95 A.2d 656 (1953); Charles X. Miller, Inc. v. Oak Builders, Inc., 360 So.2d 449, 451 (La. App. 1975). A dispute as to the terms of a contract or the meaning of those terms may provide the proper basis for an accord and satisfaction. Hayden v. Coddington, 169 Pa. Super. 174, 82 A.2d 285 (1951). Finally, payments which are admittedly due, such as partial payments by debtors, do not serve as consideration for an accord and satisfaction. Sternbergh v. Fehling, 396 Pa. 280, 152 A.2d 473 (1959); Charles X. Miller, Inc. v. Oak Builders, Inc., supra, 306 So. 2d at 451.

The refund to Maxwell was not an already existing obligation in the sense

that it was admittedly due. Indeed, it could only be considered an existing obligation in the sense that Popeyes was freely entitled to refund Maxwell's $5,000.00 at any time prior to entry into a formal contract, and for any reason.[20] Accordingly, there was no error in this instruction.

ESTOPPEL

PFF also challenges the courts instruction on estoppel, complaining that the court did not specify that the estoppel defense was applicable only to the non-antitrust claims, but that the language of the instruction made it applicable to all of its causes of action against Marriott.

PFF takes this instruction out of context. The estoppel instruction was delivered after the instructions on interference with contractual relations claim and long after the instructions on

the antitrust claims. As such, the instruction was sufficiently divorced from the antitrust instructions so as to avoid confusing the jury.

Moreover, not only did the jury not reach the issue of estoppel, but it also did not have the opportunity to apply the estoppel instruction to any of the antitrust issues because of its finding that PFF had failed to prove either a conspiracy or a relevant market. Without proof of a conspiracy and a relevant market, PFF could not establish a violation of Sections 1 or 2 of the Sherman Act.

Finally, the estoppel claim was premised on the finding of a contract. Because the jury found that there was no contract, the estoppel instruction was irrelevant.[21]

PFF raises a host of other objections, primarily relating to the instructions on damages, the use of depositions in cross examination and the submission of the special interrogatories to the jury. These objections are completely devoid of any merit and do not warrant any further discussion.

Accordingly, the plaintiffs' motion for a judgment notwithstanding the verdict or in the alternative for a new trial will be denied.

FOOTNOTES

[1]PFF's request for a judgment notwithstanding the verdict is particularly inappropriate. Under Rule 50 of the Federal Rules of Civil Procedure, a judgment notwithstanding the verdict ("JNOV") may be granted only where, viewing the evidence in the light most favorable to the non-moving party, there was no evidence presented at trial upon which the jury could properly find a verdict for those parties. See, Galloway v. United States, 319 U.S. 372 (1943); Denney v. Siegel, 407 F.2d 433 (3d Cir. 1969). As there is ample evidence in the record that supports the jury's finding in response to the special interrogatories, the motion for a JNOV must be rejected.

[2]William A. Copeland, III is the executive vice-president of the franchise sales department. Terrel Rhoton is his assistant. See. Testimony of Williams A. Copeland, III, May 7 Tr. at 7-10.

[3]Testimony of Terrel Rhoton, May 6 Tr. at 7-10.

[4]Popeyes is permitted to alter the terms of the Franchise Agreement between the time the Option Agreement is signed and the individual franchise agreement is executed, except with respect to royalties and the term of the franchise. See, Popeyes Option Agreement with Maxwell dated October 7, 1982, Plaintiff's Exhibit 3.

[5]Testimony of Charles Maxwell, April 24 Tr. at 89-90.

[6]PFF Inc. was created by Maxwell and his partners, and together they own 100% of the stock in the corporation. Charles Maxwell is the president and Arlie Maxwell is the vice-president.

[7]The Supreme Court thus overruled its earlier decision in United States v. Arnold Schwinn & Co., 388 U.S. 365 (1967), which applied a partial per se test to vertical territorial restrictions.

[8]Special interrogatories 2 and 8, which are identically worded, asked the jury "Do you find, by a preponderance of the evidence, that the relevant product market, as that term is used with respect to the antitrust laws, consists only of spicy fast food chicken?" The jury only answered interrogatory 8, which asked this question in relation to PFF's claim under §2 of the Act, as it did not reach this issue with respect to the §§ claim because it found that there was no conspiracy in restraint of trade.

[9]For example, Dr. Shepherd refused to admit that an agreement between a franchisor and a franchisee is a vertical agreement, but then readily admitted that territorial restrictions imposed by franchisors are vertical in nature and can have pro-competitive effects. See, Testimony of William Shepherd, May 1 Tr. 28-38.

[10]Furthermore, Charles Maxwell of PFF admitted that he suffered a 25% loss of revenues when a Kentucky Fried Chicken opened next door. Testimony of Charles Maxwell, April 24 Tr. at 116.

This also indicates that Popeyes faces competition from other fast food franchises.

[11]PFF did not include a claim of monopolization in its complaint, and conceded at the charging conference that it made no difference whether a monopolization charge was given. May 8 Tr. at 43. Accordingly, PFF's assignment of error on the monopolization claim need not be discussed. At any rate, there was no error in any of the challenged instructions on monopoly, as the above discussion will demonstrate.

[12]PFF's objections to the court's instructions on conspiracy to monopolize are also unfounded. Not only are PFF's proposed instructions identical to the instruction to which PFF now objects, (See proposed instruction 51 and May 9 Tr. at 136), but the jury's finding that there was no conspiracy in response to interrogatory No. 1 precludes a finding of conspiracy to monopolize, since the former offense includes the latter.

[13]The jury responded "no" to Special Interrogatory 12 which asked "[d]o you find by a preponderance of the evidence that plaintiff and defendant Popeyes reached final agreement that plaintiff would receive five additional franchises and intended to and agreed to be bound before reducing any agreement to a formal, written Popeyes Option Agreement and signing that formal Popeyes Option Agreement."

[14]The formal Option Agreements also set forth a specific schedule for

development. See, e.g., Popeyes Option Agreement with PFF dated October 7, 1982.

[15]The charge on this issue reads in pertinent part:

You must determine whether the contract was a conditional one. By that, I mean before Popeyes had any duty to fulfill this obligation, plaintiff was required to send to Popeyes financial information regarding its ability to open additional franchises and to prove its ability to operate Popeyes franchises in a capable manner.

In addition, Popeyes had to find that this financial information showed the plaintiff could satisfactorily operate additional franchises. These were two conditions which you may find that the plaintiff was required to fulfill before Popeyes had any obligation to perform its part of the contract. Popeyes did not have to perform its part of the contract unless and until plaintiff has established that he satisfied the conditions. May 9 Tr. at 141-42. (emphasis added).

[16]Indeed, while the issue of whether or not there is an agreement is a question of fact for the jury, it is within the province of the court to determine if the contract was conditional as a matter of law. See, National Products Co., Inc. v. Atlas Financial Corp., 238 Pa. Super. 152, 364 A.2d 730, 733 (1975).

[17]In answer to interrogatory 18(e) of Popeyes' First Interrogatories to Plaintiff which asked PFF to describe "the consideration which was given to Popeyes by plaintiff", PFF answered "$5000.00". See 18(e) of PFF's Supplemental Responses to Popeyes' Interrogatories. Similarly, PFF stated in both its first and second memoranda in opposition to Popeyes' motion for summary judgment that the consideration was the $5000.00. See pages 30 and 5 of the memoranda, respectively.

[18]There can be no claim for interference with existing contractual rights because the jury found there was no contract. In addition, contrary to PFF's contention, the jury was given separate instructions on the intentional interference with actual and prospective contractual rights claim. See, Tr. May 9 at 144-45.

[19]PFF also claims that it was surprised at trial by Popeyes' assertion of the accord and satisfaction defense. This contention is difficult to believe as Popeyes raised the issue in its February 12, 1985 motion for summary judgment, and PFF briefed the issue in response.

[20]This highlights an inconsistency in PFF's argument. If the $5000.00 was admittedly due, it could not have been consideration for the contract, the theory on which PFF originally litigated the case. In any event, there is no credible evidence to support its contention that the refund was an already existing obligation.

[21]PFF also did not object that the wording was ambiguous or the instruction should specify its inapplicability to the antitrust claims. See, May 9 Tr. at 177; May 8 Tr. at 104. PFF has therefore waived any right to raise the issue now.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

PHILADELPHIA FAST FOODS, INC., et al.	:	CIVIL ACTION
v.	:	
POPEYES FAMOUS FRIED CHICKEN, INC., et al.	:	NO. 84-825

ORDER

AND NOW, this 13th day of MARCH, 1986, upon consideration of the plaintiffs' motion for a judgment notwithstanding the verdict and, in the alternative, for a new trial, the memoranda submitted by the parties, and for the reasons stated in the accompanying memorandum, it is

ORDERED

that the plaintiffs' motion is DENIED.

BY THE COURT

JOSEPH L. McGLYNN, JR. J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

PHILADELPHIA FAST FOODS, INC.	:	CIVIL ACTION
v.	:	
POPEYES FAMOUS FRIED CHICKEN, INC. and MARRIOTT CORP.	:	NO. 84-825

PHILADELPHIA FAST FOOD PARTNERSHIP AND PHILADELPHIA FAST FOODS, INC.,	:	CIVIL ACTION
v.	:	
A. COPELAND ENTERPRISES, MARRIOTT CORPORATION, AND POPEYES FAMOUS FRIED CHICKEN AND BISCUITS, INC. ON WRIT OF CERTIORARI TO THE	:	NO. 85-968

ORDER

AND NOW, this 7th day of APRIL, 1986, in accordance with the Order of Consolidation dated May 10, 1985, it is

ORDERED

that the Memorandum and Order entered in Civil Action No. 84-825 on March 13,

1985 shall be amended so as to be captioned as above and that the docket reflect that the Memorandum and Order pertains to both actions.

BY THE COURT

JOSEPH L. McGLYNN, JR. J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1228

PHILADELPHIA FAST FOOD PARTNERSHIP
& PHILADELPHIA FAST FOODS, INC.,
v.
A. COPELAND ENTERPRISES, MARRIOTT
CORPORATION AND POPEYES FAMOUS
FRIED CHICKEN AND BISCUITS, INC.,
(D.C. Civil 84-0825)

PHILADELPHIA FAST FOOD PARTNERSHIP
(NO. 1) & PHILADELPHIA FAST FOODS,
INC.,
v.
A. COPELAND ENTERPRISES and MARRIOTT
CORPORATION and POPEYES FAMOUS
FRIED CHICKEN AND BISCUITS, INC.,
(D.C. Civil 85-0968)

Philadelphia Fast Food
Partnership & Philadelphia Fast
Foods, Inc.,
Appellants

On Appeal from the United States
District Court for the Eastern District
of Pennsylvania
Civil Nos. 84-0825 and 85-0968
(Honorable Joseph L. McGlynn, Jr.)

Submitted Under Third Circuit
Rule 12(6)
October 27, 1986

Before: ADAMS, HIGGINBOTHAM, and GARTH, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellants.

BY THE COURT,

Circuit Judge

ATTEST:

Sally Mvros, Clerk

DATED: Nov 3, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1228

PHILADELPHIA FAST FOOD PARTNERSHIP
& PHILADELPHIA FAST FOODS, INC.,
v.
A. COPELAND ENTERPRISES, MARRIOTT
CORPORATION AND POPEYES FAMOUS
FRIED CHICKEN AND BISCUITS, INC.,
(D.C. Civil 84-0825)

PHILADELPHIA FAST FOOD PARTNERSHIP
(NO. 1) & PHILADELPHIA FAST FOODS,
INC.,
v.
A. COPELAND ENTERPRISES and MARRIOTT
CORPORATION and POPEYES FAMOUS
FRIED CHICKEN AND BISCUITS, INC.,
(D.C. Civil 85-0968)

Philadelphia Fast Food
Partnership & Philadelphia Fast
Foods, Inc.,
Appellants

SUR PETITION FOR PANEL REHEARING
AND REHEARING IN BANC

Present: ALDISERT, Chief Judge, SEITZ,
ADAMS, GIBBONS, WEIS,
HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON, MANSMANN, and GARTH,
Circuit Judges

The petition for panel rehearing and rehearing in banc filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for panel rehearing and rehearing in banc is denied.

BY THE COURT,

_____

Circuit Judge

Dated: Nov 26, 1986